

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-001921  
[2019] NZHC 1839**

BETWEEN

GEOFFREY MAIRS  
Appellant

AND

COMPLAINTS ASSESSMENT  
COMMITTEE 413  
Respondent

Hearing: 7 May 2019

Appearances: A Hart for the Appellant  
J D Simpson for the Respondent

Judgment: 31 July 2019

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**JUDGMENT OF HINTON J**

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*This judgment was delivered by me on 31 July 2019 at 2.30 pm  
pursuant to Rule 11.5 of the High Court Rules*

.....  
*Registrar/Deputy Registrar*

*Solicitors:*  
Hart & Associates, Auckland  
Meredith Connell, Auckland

[1] Mr Mairs was a licensed salesperson under the Real Estate Agents Act 2008 (the Act). He was found guilty of one charge of disgraceful conduct by the Real Estate Agents Disciplinary Tribunal (the Tribunal).<sup>1</sup> Mr Mairs was found to have taken the keys to a client's property, stayed in the property overnight without permission, and given a false explanation to a member of the public and to the Police when discovered the next morning.

[2] The Tribunal determined to cancel Mr Mairs' licence in a subsequent decision on penalty.<sup>2</sup> The Tribunal considered this to be the only appropriate outcome given the duration of the unauthorised intrusion into the property, his dishonesty on being apprehended, his lack of insight into the seriousness of the situation that he brought about, and Mr Mairs' conduct when dealing with the disciplinary investigation.

[3] Mr Mairs now appeals the Tribunal's determination, on penalty only. He says that instead of his licence being cancelled, he should have been suspended for a period, with directions for assessment (and treatment if necessary) as to rehabilitative needs.

## **Background**

### *Misconduct decision*

[4] Mr Mairs held a salesperson's licence under the Act. At all material times he was employed by Bayleys Real Estate Limited. Another Bayleys salesperson, David Anderson, was responsible for a property listed with Bayleys at 4/2 Atkin Avenue, Mission Bay, to which the charge of disgraceful conduct relates. The property was vacant, as the owners lived overseas, but it contained staged furniture for marketing purposes.

[5] On the night of 27 February 2017, Mr Mairs had been evicted from his home. He had contacted Mr Anderson by telephone, to ask for a place to stay. The Tribunal accepted Mr Anderson's evidence that he declined to give Mr Mairs a place to stay, and that Mr Mairs in a later phone call asked him about the Atkins Avenue property

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<sup>1</sup> *Complaints Assessment Committee 413 v Mairs* [2018] NZREADT 9 [misconduct decision].

<sup>2</sup> *Complaints Assessment Committee 413 v Mairs* [2018] NZREADT 41 [penalty decision].

and said he had a buyer to show through. Mr Anderson told him where the keys were located on his desk at Bayleys' offices.

[6] Mr Mairs then travelled to Bayleys' offices at Auckland CBD. Security logs showed that Mr Mairs accessed the secure area at Bayleys' offices, where Mr Anderson's desk was located, at 8.13 pm. The Tribunal found that he took the property key from Mr Anderson's desk.

[7] Mr Mairs then went to the Atkin Avenue property. He stayed there overnight, sleeping on an inflatable mattress (part of the staged bed).

[8] Mr Mairs was discovered the following morning by Mrs Court, whose son owned the property. He was using the shower at the time she arrived. Mrs Court went outside and contacted Bayleys.

[9] When Mr Mairs came outside the property, Mrs Court approached him. Mr Mairs said that he was "working for David" and was showing someone around the property that morning. After a short discussion, Mrs Court called the Police. Mr Mairs gathered his belongings, put the keys on a nearby wall and left.

[10] He was found by the Police outside the Mission Bay cinema. He repeated that he was there to show someone around the property and had taken the keys from "Dave's desk". The Police contacted Mr Anderson, who confirmed that Mr Mairs should not have been at the property without a buyer. Mr Mairs was then arrested for being unlawfully on the property.

[11] When found by Mrs Court and when dealing with the Police, Mr Mairs had sent a number of text messages to Mr Anderson. These messages variously referred to the parents being there, his hiding in the bathroom, asking Mr Anderson what to do, and giving the same explanation about showing a buyer through. Mr Anderson messaged back asking what Mr Mairs was talking about.

[12] The Tribunal considered that in these messages, Mr Mairs was in a state of panic and was asking Mr Anderson to corroborate a false explanation. The Tribunal

said the messages showed a clear appreciation that he ought not to have been in the property.

[13] The primary issue for the Tribunal was how Mr Mairs gained access to the property and why. Mr Mairs did not dispute staying at the property, his actions when found by Mrs Court the next morning, or that his explanation about having a buyer to show through was false. His evidence at the hearing was that, when he contacted Mr Anderson for a place to stay, Mr Anderson collected him from Bayleys' offices and took him to the property. His evidence was that Mr Anderson deceived him into believing he had authority to let him stay. He denied knowing that the property was a listed property for sale until Mrs Court arrived the next day.

[14] The Tribunal rejected this account as false, and found that Mr Mairs accessed the property without Mr Anderson's knowledge or assistance. The reasons for rejecting Mr Mairs' account are set out in the misconduct decision. The Tribunal placed particular weight on:

- (a) Mr Mairs' evidence being quite different from the explanation he gave Mrs Court and the Police when arrested, and inconsistent with the text messages that he sent to Mr Anderson when discovered.
- (b) The fact Mr Mairs had the opportunity to acquire the keys from Bayleys' office.
- (c) The improbability of Mr Mairs' version of events, particularly his explanation that he lied on the day to protect Mr Anderson. Nor was it plausible that Mr Anderson would have assisted him in the way that he claimed.

[15] On the facts as found, the Tribunal found that Mr Mairs' conduct amounted to disgraceful conduct. I quote from their determination:

[101] In our judgment, a reasonable agent of good standing or a reasonable member of the public would agree that the conduct of the agent in this case was disgraceful. Conduct of this kind is erosive of public confidence in real estate agents. Further, conduct of this kind is contrary to the objective of the

Act, namely the protection of those who seek the services of licensed real estate agents. Members of the public who deal with real estate agents are entitled to expect that they will carry out their functions with honesty and integrity. When members of the public provide agents with the means of accessing their properties, they are entitled to assume that agents will not misuse the trust that has been reposed in them. They will expect that the security of their properties will not be put at risk.

[102] The actions of Mr Mairs in this case plainly violated these requirements. He lied to those he was dealing with. He took advantage of the means of access to the property for his private advantage and in a way which was plainly unauthorised. This was serious misconduct which in our view would be regarded by reasonable agents of good standing, and members of the public, as being disgraceful. For those reasons we find that the charge brought against Mr Mairs is established.

### **Penalty decision**

[16] In a subsequent decision following a hearing on penalty, the Tribunal determined to cancel Mr Mairs' salesperson licence.

[17] The Tribunal took the entire course of Mr Mairs' conduct into account, as it is entitled to do on penalty. In *Daniels v Complaints Committee 2 of the Wellington District Law Society*, the High Court said:<sup>3</sup>

[30] If a practitioner engaged, for example, in disreputable correspondence with a complaints committee or disciplinary tribunal, or conducted himself in a belligerent way in which he responded to legitimate complaints made to a Law Society Complaints committee, a tribunal may take a dim or adverse view of his overall behaviour. The practitioner cannot expect that to be a factor that is ignored in the exercise of the tribunal's power. That is because character – good or bad – may be very relevant when sanctions or penalties may come to be imposed.

[18] The Tribunal held the following matters to be of importance:

- (a) The extent of Mr Mairs' unauthorised intrusion into the property. He stayed overnight and used the bed and bathroom.
- (b) Mr Mairs' dishonesty on being apprehended, namely the false explanation to Mrs Court and to the Police that he was there to meet a buyer.

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<sup>3</sup> *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [30].

- (c) Mr Mairs' lack of insight into the seriousness of the situation, particularly his continued denial of any lack of authority for being in the property, and lack of candour in dealing with a member of the public, the Police and investigators for the Real Estate Agents Authority.
- (d) The objectionable manner in which Mr Mairs comported himself when dealing with the Authority investigators. He invoked threats of legal action and used insulting language.

[19] The Tribunal adopted a starting point of cancellation, saying that the need to protect the public and ensure compliance by licensees required a penalty which demonstrated the seriousness with which the charge should be regarded.

[20] The Tribunal said Mr Mairs declined to provide any information that would be relevant to the sentencing. They said had he presented an exceptional case in which rehabilitation was a realistic possibility, it may have been incumbent on the Tribunal to consider suspension, but they were unable to discern any grounds upon which suspension could be regarded as a realistic option. The Tribunal ordered cancellation on the basis that Mr Mairs was "simply unsuitable to be a person licensed under the Act to sell real estate".

### **Approach to appeals against penalty in the disciplinary context**

[21] There is uncertainty as to whether appeals against penalty in a disciplinary context should be categorised as general appeals on *Austin Nichols* principles, or as appeals against a discretion, where the criteria are harder to meet.<sup>4</sup> In *Morton-Jones v Real Estate Agents Authority*,<sup>5</sup> Woodhouse J held that appeals against penalty decisions under the Act proceed as appeals against the exercise of a discretion, without giving the point express consideration. However, a number of decisions under the Lawyers and Conveyancers Act 2006 (including decisions of a Full Bench),<sup>6</sup> and in

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<sup>4</sup> *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

<sup>5</sup> *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804.

<sup>6</sup> *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103 at [12]; *Sisson v Standards Committee 2 of the Canterbury-Westland Branch of the New Zealand Law Society* [2013] NZHC 349, [2013] NZAR 416 at [14].

the health practitioners' context, have held that appeals against penalty should proceed as general appeals. In *Drever*,<sup>7</sup> a case involving a real estate agent, I indicated a preference for the latter approach, but, as in *Morton-Jones*, the point was not argued before me. The Committee had agreed that the case should proceed on the basis of a general appeal.

[22] In this case, as in *Drever*, the Committee has agreed that I should proceed as if it were a general appeal. Mr Simpson nonetheless made submissions on the point, but I have decided I should not consider the matter further as Mr Hart relied on the consent position, and did not advance submissions as to the correct approach.

[23] I therefore proceed as if this were a general appeal. I agree with Mr Simpson, for the Committee, that in the majority of cases, the outcome will be the same.

[24] For the test applicable on general appeals, I rely on the following passage from the Supreme Court decision in *Kacem v Bashir*:<sup>8</sup>

... for the present purposes, the important point arising from *Austin Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

### **Grounds of appeal**

[25] Mr Mairs says that a penalty less than cancellation should have been imposed. Cancellation is at the highest end of the available penalty range, followed by suspension of not more than 24 months. As noted earlier, Mr Mairs says he should have been suspended instead.

[26] First, he alleges that the Tribunal did not have regard to personal mitigating factors, namely the financial and personal stress that he was suffering at the time, his

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<sup>7</sup> *Drever v Complaints Assessment Committee* 403 [2017] NZHC 2213 at [20].

<sup>8</sup> *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

reliance on alcohol as a coping mechanism, and health issues, including a sleep disorder requiring a breathing machine that meant he had to have access to a power supply, which would not have been available to him had he not stayed at Atkin Avenue. Mr Mairs says the Tribunal accordingly did not give adequate weight to his rehabilitative prospects.

[27] Second, he alleges that the penalty of cancellation is out of line with prior authority and the nature of his conduct.

*Personal mitigating factors*

[28] As to the first point, it is correct that the Tribunal did not have regard to these personal factors. In fact, it seems Mr Mairs declined to provide the Tribunal with any submission in mitigation.

[29] The Committee accepts, and I have to on all of the evidence, that at least some of the personal factors to which Mr Mairs refers were likely to be present, to some degree. The Tribunal will have been aware of some of them from the evidence led in respect of the charge. Clearly Mr Mairs was under stress at the time.

[30] However, personal mitigating factors such as those relied on carry reduced weight in a professional disciplinary process like this one, because the primary focus in such proceedings is on protection of the public and the reputation of the profession as a whole, rather than on the individual licensee. The primary objective is not to punish, though a penalty will have that effect. The primary objective is general deterrence and imposing a penalty that serves to maintain the standards of the profession.<sup>9</sup> Taking a more lenient approach to a finding of serious misconduct, on the basis advanced by Mr Mairs, is not consistent with those objectives.

[31] Nonetheless, as the Tribunal itself intimated in the penalty decision, if, taking account of those personal stress factors and subsequent remedial actions, the Tribunal could reach a conclusion of likely rehabilitation, or of a one-off situation, then there could have been consideration of a lesser penalty.

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<sup>9</sup> *Auckland Standards Committee 2 v Parshotam* [2016] NZLCDT 15 at [58].



[32] By implication, the Tribunal could not discern any grounds on which rehabilitation and therefore suspension was a realistic option.<sup>10</sup> I agree. This was not just a case of great stress leading to bizarre one-off behaviour. It involved prolonged untrustworthy and erratic behaviour, which lasted for some 16 months after the February 2017 events, as the Tribunal detailed. Mr Mairs was still maintaining at the Tribunal hearings that Mr Anderson deceived him into believing he had authority to let him stay in the house. The Tribunal found that was false, and it was clearly so, just simply on the basis of his own conduct the next morning.

[33] I can see nothing that points to likely rehabilitation. Mr Mairs' counsel points to Mr Mairs having allegedly checked himself into a "detox unit" and having allegedly not drunk alcohol for 12 months. There is no proof of these things. In any event, they do not overcome the repeated dishonesty or lack of insight into what is right and wrong conduct for an agent. This is simply not a case where the way Mr Mairs has responded to the charge could lead me to the view there would be no repeat misconduct – to the contrary.

[34] For the above reasons, I do not consider that the personal stress factors even if they had been expressly put to the Tribunal, would have made any material difference to penalty.

*Not in line with authority*

[35] The appellant submits that the cancellation penalty was out of line with prior authority, given that his dishonesty did not relate to the handling of money, was impulsive rather than premeditated, and caused no loss to the vendors.

[36] There does not seem to be any previous determination of the Tribunal which involves comparable facts, but that is not uncommon with disciplinary proceedings.

[37] I agree that there is not dishonesty here of the worst sort, as in cases where there is fraud and/or material loss to a vendor. In *Morton-Jones*, for example, (where the agent's licence was cancelled), there was dishonesty in the handling of money.

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<sup>10</sup> Penalty Decision at [15].

[38] However, as the Tribunal said in *Complaints Assessment Committee v Gollins*: “dishonesty of any type is met with the highest degree of disapprobation by registration bodies and by members of the public who must retain confidence in the honesty and integrity of agents”.<sup>11</sup>

[39] I agree with the Committee that there is not much difference between misusing client funds, and misusing a client’s property. Both involve a breach of the trust and confidence that a client has reposed in an agent. A client would not wish to deal with an agent they knew had slept in another client’s listed staged property without permission. It flies in the face of what is expected from an agent.

[40] Nonetheless, had that been as far as the matter went, then it may well be that cancellation would have been too severe. But for all the reasons that the Tribunal sets out, I agree that cancellation was appropriate here. I do not consider any lesser penalty would have been adequate.

[41] In summary, on the facts as found, Mr Mairs deliberately took the keys to a client’s property without authorisation, remained in the property overnight, and gave a false explanation to the owner’s mother and to the Police the next morning. He attempted, unsuccessfully, to have another licensee corroborate his false account. He later maintained a different account in a disciplinary investigation and misconduct hearing, which was found to be untruthful. During that process, his conduct was unprofessional and abrasive. To date, he has not demonstrated any true insight into his conduct.

## **Conclusion**

[42] I therefore agree with the Tribunal that the totality of Mr Mairs’ conduct does demonstrate that he is not a fit and proper person to hold a licence under the Act and that the penalty of cancellation was correct.

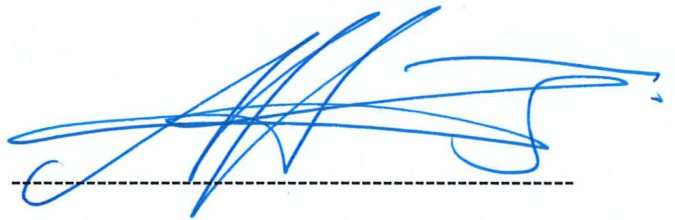
[43] The appeal is therefore dismissed.

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<sup>11</sup> *Complaints Assessment Committee v Gollins* [2015] NZREADT 2 at [42] (emphasis added).

## Costs

[44] I am advised that Mr Mairs is legally aided. The Committee has nonetheless reserved its position on seeking costs and so I reserve the matter of costs in the event the Committee considers there is some basis on which it can make an application. Any such application would have to be made within 14 days.

A handwritten signature in blue ink, consisting of several overlapping, fluid strokes, positioned above a horizontal dashed line.

Hinton J